INTERIOR BOARD OF INDIAN APPEALS

Walter S. Brown v. Commissioner of Indian Affairs

8 IBIA 183 (10/28/1980)

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United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

WALTER S. BROWN

v.

COMMISSIONER OF INDIAN AFFAIRS

IBIA 80-10-A Decided October 28, 1980

Appeal from decision by Acting Deputy Commissioner of Indian Affairs denying appellant's request to gift deed a portion of his allotment on the Quinault Reservation to his nephew, also an owner of a Quinault allotment, on grounds that the nephew was not qualified under the Indian Reorganization Act to receive such a gift.

Reversed.

1. Indian Tribes: Membership

It is for the Indian tribe, not this Department, to determine composition of the tribe. In 1922 the Quinault Tribe did not recognize as members thereof any Indian of the reservation, but affiliate memberships were authorized for persons of one-quarter Quileute, Hoh, Chehalis, Chinook, or Cowlitz blood, under specified conditions.

2. Indian Lands: Allotments: Alienation--Indian Reorganization Act:

In light of the unique history of land ownership and Federal-Indian relations on the Quinault Reservation, any Quinault allottee living on June 1, 1934, should be entitled to receive other trust land on the reservation by gift deed in accordance with the provisions of secs. 5 and 19 of the Indian Reorganization Act (25 U.S.C. §§ 465 and 479 (1976)).

APPEARANCES: Daniel L. Van Mechelen, Seattle, Washington, for appellant; James R. Kuhn, Jr., Esq., Office of the Regional Solicitor, Portland, Oregon, for respondent.

OPINION BY CHIEF ADMINISTRATIVE JUDGE HORTON

Walter S. Brown has appealed from a decision rendered September 21, 1979, by Acting Deputy Commissioner of Indian Affairs, Theodore C. Krenzke, wherein it was held that appellant could not gift deed a portion of his allotment located on the Quinault Indian Reservation (Allotment No. Q 1674) in trust to his nephew, Daniel L. Van Mechelen, holder of a trust patent on the Quinault Reservation.

The Quinault Reservation is governed by the provisions of the Indian Reorganization Act of June 18, 1934 (IRA), 48 Stat. 984, 25 U.S.C. §§ 461-486 (1976), as amended. Section 5 of the Act, codified at 25 U.S.C. § 465, generally authorizes the gift conveyance of

trust land to an Indian or Indian tribe. Section 19 of the Act, codified at 25 U.S.C. § 479, defines the term "Indian" for, among other purposes, determining who may receive a gift conveyance of an allotment in trust status. This section reads in pertinent part as follows:

> § 479. Definitions
>
> The term "Indian" as used in section 461, 462, 463, 464, 465, 466-470, 471-473, 474, 475, 476-478, and 479 of this title shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood.

The above section denotes three means by which an individual may be considered an Indian for certain IRA purposes, including, as pertinent herein, eligibility to receive a conveyance of trust land located on an IRA reservation. The issue in this appeal is whether Daniel L. Van Mechelen, the proposed recipient of a gift of trust land located on the Quinault Reservation, satisfies any of the "Indian" definitions set forth in 25 U.S.C. § 479.

Summary of Bureau's Position

The Commissioner's Office held that Mr. Van Mechelen does not satisfy the eligibility requirements of section 479 because: (1) he

is only one-eighth Indian blood (Cowlitz), precluding compliance with the statutory classification of "persons of one-half or more Indian blood"; (2) the Cowlitz Tribe, in which Mr. Van Mechelen is a member, neither now nor in the past has received Federal recognition, thereby, precluding compliance with the statutory classification of "persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction"; and (3) although Mr. Van Mechelen is a descendant of a member of a recognized Indian tribe under Federal jurisdiction, he was, nevertheless, not a resident of the Quinault Reservation on June 1, 1934, precluding compliance with the residency requirement of section 479.

Appellant's Position

Appellant, who is represented in this matter by Mr. Van Mechelen, maintains that Indians who were allotted lands on the Quinault Reservation, even though not of Quinault blood, may not be deprived of benefits accorded individual Indians under the IRA, especially when such allottees appeared on the census roll for the Quinault Reservation when the IRA was enacted.

Preliminary Findings

The Bureau and appellant do not disagree as to the following. Mr. Van Mechelen is a member of the Cowlitz Tribe, which is not

federally recognized. He is the owner of a trust patent located on the Quinault Reservation. The trust patent was granted by President Roosevelt on April 21, 1933, pursuant to the Act of March 4, 1911, 36 Stat. 1345. Mr. Van Mechelen possesses less than one-half degree Indian blood. When the IRA was enacted, Mr. Van Mechelen appeared on the official census roll of Indians of the Quinault Reservation. However, having been born on September 22, 1928, he was not old enough to vote on the acceptance of the IRA, as were adult Indians of the Quinault Reservation. 1/ Mr. Van Mechelen is a descendant of an Indian who, on June 1, 1934, was a member of a recognized Indian tribe under Federal jurisdiction. On June 1, 1934, Mr. Van Mechelen's actual residence was not within the boundaries of any Indian reservation.

Discussion, Other Findings, and Conclusions

Appellant's chief theory in this appeal is that notwithstanding that the present day Quinault Tribe fails to recognize Mr. Van Mechelen as a member thereof, as an "Indian of the Quinault Reservation" when the IRA was passed, Mr. Van Mechelen was a member of a federally recognized group of Indians at that time and, under the wording of section 19, he is presently entitled to the benefits of the IRA.

1/ Section 18 of the IRA left the choice of whether or not the Act would apply to a particular reservation to a majority vote of the adult Indians of the reservation. See 25 U.S.C. § 478.

According to appellant, the Bylaws of the Quinault Tribe from 1922 to 1965 recognize that the Quinault Tribe and "Indians of the Quinault Reservation" were one and the same entities. (Appellant's brief filed August 29, 1980, at 3 and 7.)

As authority for the proposition that membership in a recognized tribe as of 1934 is sufficient to satisfy the requirements of section 19 of the IRA, appellant cites the beginning passage of the law which reads: "The term 'Indian' * * * shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction." (Appellant's emphasis.) We do not consider it necessary to dwell on the import of the phrase underscored above for the reason that appellant cannot show that Mr. Van Mechelen was a member of a federally recognized tribe on June 18, 1934 (the date of enactment of section 19). Accordingly, we are not persuaded that the Quinault (or Quinaielt) Reservation were "one and the same" when the IRA was passed.

Appellant's original position in this appeal was that there was no Quinault Tribe in 1934 but, instead, a group known as the "Indians of the Quinaielt Indian Reservation." (Notice of Appeal dated October 29, 1979, at 1.) In support of this contention, appellant makes reference to bylaws adopted by the first council of this "group" on August 24, 1922, entitled: "By-Laws of the General Council of The

Indians of the Quinaielt Indian Reservation." After counsel for the respondent bureau pointed out in its answer brief that the bylaws cited by appellant commence with the words, "We, the members of the Quinaielt Tribe of Indians of the Quinaielt Reservation," appellant replied as follows:

> Mr. Kuhn points out my contention that in 1934 there was no "Quinaielt Indian Tribe." I stand corrected. Mr. Kuhn's "discovery" proves that the "Quinaielt Tribe of Indians of the Quinaielt Reservation" and the "Indians of the Quinaielt Indian Reservation" were one and the same in 1922 and 1965 (when the bylaws were amended) and all the years in between."

Reply Brief at 3.

[1] The Board does not accept the strained interpretation which appellant gives to the bylaws cited. First, it is for the Indian tribe and not this Department to determine composition of the tribe. See Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978); United States v. Mazurie, 419 U.S. 544 (1975); Martinez v. Southern Ute Tribe of Southern Ute Reservation, 249 F.2d 915 (10th Cir. 1957). Second, the 1922 Bylaws of the Quinault Tribe, which were in effect in 1934, identified the requirements necessary for membership in the tribe. Contrary to appellant's assertion, these bylaws did not authorize membership for any Indian of the reservation. Affiliate memberships were authorized,

however, for persons of one-quarter Quileute, Hoh, Chehalis, Chinook, or Cowlitz blood under other specified conditions. 2/

Because appellant cannot show that the Quinault Tribe recognized Mr. Van Mechelen as a member thereof in 1934, and in the absence of any evidence that he was or is now a member of any other federally recognized tribe, Mr. Van Mechelen fails to satisfy the first definition of "Indian" set forth in 25 U.S.C. § 479.

The only definition which Mr. Van Mechelen can possibly satisfy under 25 U.S.C. § 479, in order to receive a gift conveyance of trust land, is as a descendant of a member of a federally recognized tribe who, on June 1, 1934, was residing within the boundaries of an Indian reservation. 3/

The above criterion is susceptible to several interpretations. There is first of all an ambiguity as from whom Congress expected residence on a reservation at the time prescribed. By memorandum dated March 24, 1976, former Associate Solicitor for Indian Affairs Reid Chambers advised the Commissioner of Indian Affairs that the "descendant" rather than the tribal "member" must have resided within an Indian reservation on June 1, 1934. We agree with this interpretation

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2/ Article 1(b) of 1922 bylaws.

3/ Paraphrasing 25 U.S.C. § 479 which refers in part to "all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation."

and the reasons therefor. Appellant, whose cause would benefit from an opposite interpretation, does not challenge the requirement as stated.

[2] The difficult question is resolving whether the residency requirement of section 479 may be satisfied by "constructive residence" and, if so, the elements associated therewith. By memorandum dated June 14, 1976, former Associate Solicitor Chambers also expressed an opinion on this question:

> It is pointed out in the Joint Statement [of the Quinault Nation and Quinault Allottees Association of January 20, 1976] that some Quinault allottees who voted to accept the Indian Reorganization Act are now denied its benefits by the bureau policy of requiring actual residence on the Quinault Reservation rather than constructive residency which was purportedly required for voting on the Act in 1935. I can see no difference between actual and constructive residence in this situation. If the allottee is not a member of a federally recognized tribe, as provided in the first category of the statutory definition, and is less than one-half degree [Indian blood], thus not meeting the criterion of the third category, but is a descendant of a tribal member and himself voted as a Quinault allottee on the Reorganization Act, then that is a rebuttable presumption of their [sic] reservation residency. I agree with the Joint Statement that persons receiving allotments on the Quinault Reservation and who voted on the Act should not now be denied its benefits.

In response to the above opinion, the Business Committee of the Quinault Indian Nation offered its views thereon in a statement to the Assistant Secretary for Indian Affairs dated July 24, 1978. It surmised from Mr. Chambers' opinion that non-adult persons who were ineligible to

vote in the IRA election would be unable to establish "constructive residency." With respect to this situation, the Business Committee stated: "It does not appear to be equitable to limit the concept of a rebuttable presumption of constructive residence on the reservation by denying that presumption to those who, but for their minority, would have had the opportunity of establishing it."

Notwithstanding the Associate Solicitor's opinion generally favoring under the law a constructive residency approach, and the specific consent of the Quinault Business Committee to the extension of this rule to persons possessed of trust interests on the Quinault Reservation who, but for their minority, could have voted on the application of the IRA to the Quinault Reservation, the Bureau of Indian Affairs has adhered, at least in the instance of Mr. Van Mechelen, to an actual residency requirement.

We believe an actual residency requirement is too restrictive for purposes of determining who may receive an inter vivos gift of trust land on the Quinault Reservation under the provisions of 25 U.S.C. § 465 (or under 25 U.S.C. § 483 which also provides for conveyances of trust property). In light of the unique history of land ownership and Federal-Indian relations on the Quinault Reservation, any Quinault allottee living on June 1, 1934, should be entitled to receive other trust land on the reservation by gift deed.

Relevant History of the Quinault Reservation

By the Treaty of Olympia, the Quinault and Quileute Tribes ceded to the United States almost all of the lands they claimed. 4/ A provision of that treaty allowed the United States to later remove these tribes from their original reservation or reservations and consolidate them with "other friendly tribes or bands." In 1873 President Grant signed an Executive order setting the boundaries of the present Quinault Reservation for the benefit of the Quinault, Quileute, Hoh, Quit, and "other tribes of fish-eating Indians on the Pacific coast." 5/

Following passage of the General Allotment Act, 6/ allotments were made to individual Indians on the Quinault Reservation. In 1911 Congress directed the Secretary of the Interior to make allotments on the Quinault Reservation to "all members of the Hoh, Quileute, Ozette, and other tribes of Indians in Washington who are affiliated with the Quinaielt [a.k.a. Quinault] and Quileute Tribes and who may elect to take allotments on the Quinaielt Reservation rather than on the reservations set aside for these tribes." Act of March 4, 1911, 36 Stat. 1345.

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4/ Treaty of July 1, 1855, and January 25, 1856, 12 Stat. 971.

5/ Executive order of November 4, 1873, 1 Kappler, Indian Affairs Laws and Treaties 923 (1903).

6/ Act of February 8, 1887, 24 Stat. 388.

Following the 1911 Allotment Act, several court decisions were rendered interpreting the law. In United States v. Payne, 264 U.S. 446 (1924), the Court disapproved of the refusal by the Bureau of Indian Affairs to make allotments of timberland, after the available grazing and agriculture land on the reservation had been allotted. In 1931 the Supreme Court held as too restrictive the Secretary's interpretation concerning which Indians were entitled to an allotment under the 1911 Act. Halbert v. United States, 283 U.S. 753 (1931). The Court there found that the Chehalis, Chinook, and Cowlitz Tribes were among those referred to by Congress in the Act as affiliated with the Quinault and Quileute Tribes. Further, the Court held that personal residence on the Quinault Reservation was not required to obtain an allotment.

After the Halbert decision the Department resumed the allotment process on the Quinault Reservation. With passage of the Indian Reorganization Act in 1934 the allotment of Indian reservation land in severalty to any Indian was ended. 25 U.S.C. § 461. A referendum on the adoption of the IRA was voted on by adult Indians of the Quinault Reservation on April 13, 1935, pursuant to section 18 of the Act, resulting in acceptance of the IRA for the Quinault Reservation. 7/

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7/ The majority of the Indians actually residing on the reservation voted against acceptance of the IRA. The election was carried by "absentee voters." Memorandum to Commissioner of Indian Affairs from Superintendent, Taholah Agency, dated Sept. 4, 1935.

Application of the IRA to Quinault Allottees

The respondent Bureau contends in this appeal that pre-IRA history on the Quinault Reservation is irrelevant to the effect and application of the IRA today:

> Mr. Van Mechelen received a trust patent pursuant to the Act of 1911 as construed in Halbert v. United States, supra, as a Cowlitz Indian and not because he was a member of a federally recognized tribe. The IRA was a wholly new scheme of land acquisition and under section 5 the Secretary is authorized in his discretion to acquire land in trust for those who are "Indians" as specifically defined in the Act. There is no interrelationship between the 1911 Act and patents issued thereunder and the provisions of the IRA.

Answer Brief at 12.

We do not agree that it is impermissible for the Department to draw on pre-IRA history on the Quinault Reservation in interpreting or applying IRA requirements. 8/ Indeed, that is the very exercise which the Department performed in 1935 in determining the eligibility of Indians to vote in the IRA election pursuant to section 18 of the Act. Recognizing that there existed a large number of Quinault allottees who

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8/ In the recent Supreme Court decision, United States v. Mitchell, 445 U.S. 535, 100 S. Ct. 1349 (1980), the Court examined the Secretary's trust obligations on the Quinault Reservation as envisaged by Congress in both the General Allotment Act and the Indian Reorganization Act. 100 S. Ct. 1349, 1351, 1358.

were absent from the reservation, 9/ the Commissioner of Indian Affairs instructed the Superintendent of the Taholah Agency by memorandum dated March 19, 1935, that reservation residence for purposes of determining eligibility to vote on application of the IRA could be actual or constructive. The Commissioner went on to instruct that in the case of constructive residence there must be a "certificate of the absentee voter that he is merely residing away temporarily and expects to return to the reservation." 10/

The Board perceives of no reason why constructive residence should suffice for participating in the IRA election under section 18, yet not suffice for purposes of receiving land in trust under sections 5 and 19

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9/ In Halbert, the Court explained this absenteeism as follows:

"The Act of 1911 does not purport to make the right to an allotment dependent on a personal residence on the reservation. It is a special act relating only to this reservation. The land within the reservation is generally covered with a heavy growth of timber and is difficult of clearing. As a rule the Indians are poor and would be without means of supporting themselves while attempting to clear the land. The treaty secures to them the right of taking fish at all usual and accustomed grounds. Most of them are fishermen, but a few find employment in lumber camps. Most of them have for many years resided in small villages outside the reservation. Some of the villages are within small reservations made by executive orders; but the majority of the Indians have always lived outside any reservation." 283 U.S. 753, 760.

10/ The actual letter of instruction sent by the Agency Superintendent to absentee voters prior to the IRA election stated, among other things:

" [A]lthough you are absent from your reservation you should be entitled to vote on the Indian Reorganization Act * * * provided you are able to sign the enclosed statement to the effect you regard this reservation as your permanent home and legal residence * * *. This vote, or this law, places you under no obligations either to the Government or the tribe as to returning to the community or reservation."

of the Act. 11/ Further, in view of the fact that all Quinault allottees became bound by the strictures of the IRA, whether or not they voted for its application to the Quinault Reservation, 12/ the constructive residence test for sections 5 and 19 purposes should not be limited to whether or not the allottee voted or was eligible to vote in the IRA election. Just as the General Allotment Act and the Allotment Act of 1911 permitted acquisition of allotments regardless of the allottee's age, the IRA contains no age limitation on eligibility to receive inter vivos conveyances of trust land. Accordingly, we hold that any Indian who was allotted land on the Quinault Reservation and who was living on June 1, 1934, constructively satisfies the residency requirement of section 19 of the IRA.

In addition to according equal treatment to original allottees of the reservation, the above rule promotes one of the major objectives

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11/ We do not reach the question whether "constructive residence" is sufficient for other matters in which residence may be required under the IRA. In this regard, it is noted that Mr. Van Mechelen, representing an association known as "Indians of the Quinault Reservation," has pursued an administrative appeal through the Commissioner of Indian Affairs concerning the alleged entitlement of such group to formally organize under the IRA. By decision dated April 7, 1980, the Commissioner denied appellants' requested relief, incorporating the views of the Acting Associate Solicitor for Indian Affairs set forth in a memorandum to the Commissioner dated March 18, 1980. Among other things, the Acting Associate Solicitor concluded in the foregoing memorandum: "It does not follow that the constructive residence in 1935 which was sufficient to entitle absent allottees to vote on the application of the IRA is sufficient 'residence' in 1980 to entitle them to demand the right to organize. This is particularly true since the 'constructive residence' of 1935 was based on an intention to return to the reservation, an intention which most of the allottees have not pursued."

12/ Thus, for example, all allottees on the Quinault Reservation, whether or not members of the Quinault Tribe, saw legal title to their trust land vested in the United States indefinitely (section 2, IRA).

of the IRA in that it allows reservation land to be preserved in trust status. Under the present policy of the Bureau, appellant in the case at bar could gift deed trust land to his nephew, but the land would have to be conveyed in fee. 13/ Further, the rule as stated will narrow the gap between that which can be accomplished through inter vivos conveyances and that which can now be done by devise. See 25 U.S.C. § 464, as amended by the Act of September 26, 1980, 94 Stat. 1207 (P.L. 96-363). This recent enactment is significant in that it was passed by Congress to relax IRA restrictions on the devise of trust property. Section 4 of the IRA as initially adopted by Congress permitted the devise of trust property only to the tribe upon whose reservation the land is located, to any member of such tribe, or to any legal heir of the testator. The Act of September 26, 1980, now permits the devise of trust property by an Indian testator governed thereby to the testator's heirs, lineal descendants and to "any other Indian person for whom the Secretary of the Interior determines that the United States may hold land in trust."

The Board has considered in this appeal whether 25 U.S.C. §§ 465 and 479 could be further interpreted as authorizing inter vivos conveyances of trust lands among any Indians possessed of trust allotments on the Quinault Reservation, consistent with the direction Congress has now taken with respect to testamentary conveyances on IRA

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13/ Presumably, the legitimate aim of the Quinault Tribe to acquire land interests on the reservation is also frustrated when such interests are conveyed to others in fee.

reservations. We conclude that there is no legal basis for such an extended interpretation of present IRA requirements and that it is for Congress, if appropriate, to equalize the standards for inter vivos and testamentary conveyancing of trust or restricted property. The principle that rights and restrictions conferred on original allottees as recipients of trust patents run with the land (see Estate of Louis Harvey Quapaw, 4 IBIA 263, 82 I.D. 640 (1975); Couch v. Udall, 404 F.2d 97 (10th Cir. 1968)), has no application here. The "Indian" definitions set forth in 25 U.S.C. § 479 represent specific requirements which must be satisfied on an individual basis. Had Congress intended that any Indian possessed of a trust allotment on an IRA reservation could receive an inter vivos gift of similar land, it could easily have so provided.

Therefore, by virtue of the authority delegated to the Board of Indian Appeals under 43 CFR 4.1, the decision of the Acting Deputy Commissioner of Indian Affairs dated September 21, 1979, denying appellant's proposed gift of trust property to his nephew, Daniel L. Van Mechelen, on grounds that such conveyance was prohibited by law, is reversed. This decision is final for the Department.

//original signed
Wm. Philip Horton
Chief Administrative Judge

I concur:

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Franklin D. Arness
Administrative Judge